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No. 93-1293

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

SCINDIA STEAM NAVIGATION COMPANY, LTD.
and
THE SHIPPING CORPORATION OF INDIA, LTD.,
Petitioners,
v.
MICHAEL RIGGS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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I.

Introduction

The brief of respondent MICHAEL RIGGS ("respondent") in opposition to the petition for writ of certiorari is based entirely upon an expert's declaration which was submitted to the trial court in opposition to the motion for summary judgment of petitioners SCINDIA STEAM NAVIGATION COMPANY, LTD. and THE SHIPPING CORPORATION OF INDIA, LTD. ("petitioners"). The declaration, however, is irrelevant to the resolution of the issue which is central to this case: Does a vessel's legal duty of care owed to a longshoreman extend to open and obvious, unsafe conditions in the cargo stow?

Because respondent takes great liberties in characterizing the content of the expert declaration, without providing this Court with the declaration itself, a copy of it is reproduced in the Appendix beginning at page 26a. A review of the

declaration reveals both its irrelevance to the issue presented for certification and the inaccurate treatment afforded it in the opposition to certification.

II.

Legal Argument

A. The Declaration Is Irrelevant To The Issue Of The Duty Owed By The Vessel To The Longshoreman.

Respondent's reliance upon the expert declaration ignores that the issue of whether the vessel owed a duty to the longshoreman is a question of law. This Court outlined the duty owed in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981). The varying interpretations of that duty by the Circuit Courts of Appeals — particularly in regard to hazards posed by the cargo rather than by the vessel and its equipment — has created the conflict which prompted the filing of the present petition for writ of certiorari. On the one hand, the Third Circuit Court of Appeals has determined that a vessel owes no duty to an off-loading longshoreman "with respect to cargo not loaded by or under the active supervision of the vessel." *Derr v. Kawasaki Kissen K.K.*, 835 F.2d 490 (3d Cir. 1987). The Ninth Circuit Court of Appeals, on the other hand, held in this case that "a vessel has a duty to take the necessary steps to protect longshoreworkers against open and obvious cargo defects." *Riggs v. Scindia Steam Navigation Co.*, 8 F.3d 1442, 1448 (9th Cir. 1993).

In light of this conflict regarding the legal duty owed by a vessel to an off-loading longshoreman, the assertion in respondent's opposition brief that the declaration "established *as a matter of fact* that the vessel was negligent in failing to supervise and intervene in obviously improper loading operations" is anomalous. (Opposition Brief, p. 7.) The implication which respondent attempts to foster, of

course, is that the declaration establishes that the vessel in fact participated in some way in the loading of the cargo. The declaration, however, provides no factual foundation for that implication. The declarant was not a percipient witness to any of the events in question. He provides his opinion based solely upon his review of the transcript of the respondent's deposition, a review of the charter party agreement, and a maritime survey of the vessel. (App. at 27a, ¶ 5.) Nowhere in the declaration is there any indication that the declarant had any knowledge that any crew member or other vessel agent was in attendance at the loading of the vessel. In short, the declaration provides no factual basis for the implication that the vessel participated in any way in the loading of the cargo.

Moreover, while the opposition brief states that the trial court "credited" the expert testimony,[1] a review of the district court's order indicates that the district court gave the expert declaration no credit in its analysis of the open and obvious nature of the danger posed by the cargo, and the court deemed the expert declaration irrelevant on all other issues. (App. at 15a-18a.) The fact that the declaration was not contradicted in the trial court indicates only that petitioners, like the district court, recognized that it was irrelevant to the issue at hand. Petitioners did not, as the opposition implies, stipulate to the contents of the expert declaration.

The issue before the trial court and before this Court is whether the vessel owed a legal duty to participate in the loading of the cargo in order to prevent later harm to an off-loading longshoreman. The expert declaration offers nothing relevant to the analysis of that issue.

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[1]Although the opposition brief refers to "expert testimony," the only expert evidence submitted to the trial court was the declaration contained in the Appendix.

B. The Declaration Is Incompetent To Establish A Custom and Practice.

Respondent also asserts that the declaration establishes a custom and practice in the maritime industry for a vessel to supervise loading. Yet, the only basis for that assertion in the declaration is the unsupported assertion that "it is the custom and practice in the maritime industry that the vessel is responsible for the condition of the cargo which is loaded and stowed in foreign ports for discharge here." (App. at 27a, ¶ 6.) This is insufficient to establish a custom and practice.

As this Court has long held, a witness who wishes to establish a custom and practice must lay a foundation of knowledge of the existence of the elements of the custom, including its antiquity, its geographical scope, the fact that it is generally known, the fact that it is uniformly practiced, and the fact that it is regarded as obligatory. *Oelricks v. Ford,* 64 U.S. (23 How.) 49 (1860). The delcaration in question here makes no attempt to lay the necessary foundation.

III.

Conclusion.

The expert declaration relied upon in opposition to the petition for writ of certiorari is irrelevant to the determination of the duty owed by the vessel to an off-loading longshoreman. Because the Circuit Courts of Appeals are in conflict as to the duty owed, the petition should be granted.

Respectfully submitted,

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Dated: May 26, 1994

APPENDIX

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL RIGGS,
Plaintiff.

vs.

SCINDIA STEAM NAVIGATION COMPANY, LTD. AND THE SHIPPING CORPORATION OF INDIA, LTD.,
Defendants.

FILED: CLERK, U.S. DISTRICT COURT
OCTOBER 11, 1991

CASE NO. 90 4812 HLH (Sx)

DECLARATION OF HEINZ W. FRISCH
IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

DATE: October 28, 1991
TIME: 10:00 a.m.
COURTROOM: Honorable Harry L. Hupp

I, Heinz W. Frisch, declare as follows:

1. I am an individual residing at 28538 Vista Madera, Rancho Palos Verdes, California. I have been retained by plaintiff in the above-captioned action to render my opinion as an expert concerning liability.

2. The matters set forth in this Declaration are either matters of my own personal knowledge or my expert opinions based on my experience in the maritime industry and review of the facts of this case. If called as a witness, I could and would testify competently to the facts and opinions set forth herein.

3. Attached hereto as Exhibit "A" is my eight page resume detailing my experience as an Area Supervisor and Assistant Area Supervisor for the Pacific Maritime Association, Casualty Claim Adjuster for Hartford Insurance Company and Casualty Adjuster for Pacific Indemnity Insurance Group. I retired from my position as Area Supervisor for the Pacific Maritime Association on July 31, 1982.

4. From 1961 until my retirement in 1982, I had an ever increasing involvement in the maritime industry. I am fully familiar with the maritime custom and practice in the Ports of Los Angeles/Long Beach, Port Hueneme and San Diego with respect to the discharge and loading of cargo, longshore operations, application of Pacific Coast Marine Safety Code, Federal Occupational Health and Safety Regulations, California State Safety Code and other rules and regulations pertaining to longshoring. As part of my duties at the Pacific Maritime Association, I would attend onboard vessels for the purpose of evaluating and reporting unsafe conditions.

5. As an expert witness in this case, I have reviewed the deposition transcript of the plaintiff's deposition, the Charter Party Agreement governing the voyage involved in this accident, attached to the Declaration of Marc Coleman in Opposition to the Motion as Exhibit "A" and a Survey by Cullen Maritime Services, Inc. of the "Jalagopal", performed on October 4, 1989.

Based on my review of the above-mentioned documents, I have ascertained the following facts concerning plaintiff's accident.

A. The vessel "Jalagopal" was owned by defendant Scindia Steam Navigation Company, Ltd. ("Scindia") and chartered to defendant The Shipping Corporation of India, Ltd. ("SCI").

B. According to the pertinent charter party agreement, at paragraph 8, Scindia appointed the Captain who was "under the orders and directions of the charterers as regards employment and agency". Furthermore, charterer SCI assumed the responsibility "to load, stow and trim, secure, lash, unlash, tally and discharge the cargo at their expense under the supervision and responsibility of the Captain".

C. I have been informed that the defendants hired and employed the Captain and crew for the voyage through a management company and that for purposes of this motion, the vessel including both Scindia and SCI concede that the load and stowage of the cargo in the hatch where plaintiff was working was defective in that (a) there was no dunnage or cargo separation between the bundles of pipes; (b) the bundles were dropped haphazardly in the hold in no particular order; and (c) that the covering of the bundles with blue plastic or other wrapping was slippery and dangerous to walk on.

D. Plaintiff and his longshore gang working to discharge the cargo were not able to unload the cargo in a normal manner. Instead, the men had to look for the easiest bundle to discharge wherever it might be in the hatch, take that bundle out and then look for the next easiest bundle to remove. The uneven stowage of pipe created an unsafe walking area that was made slippery by the blue plastic sheet wrapping. The men were aware of this condition, discharged the pipe bundles one at a time as best they could and tried to move away from the load being taken out as quickly and safely as possible attempting to avoid injury.

E. Plaintiff was injured when he was attempting to move away from the load being lifted. He slipped and fell due to the bad footing and slippery surface of the cargo.

6. In addition to what is reflected in the charter party agreement and what has been admitted or conceded by the defendants, it is the custom and practice in the maritime industry that the vessel is responsible for the condition of cargo which is loaded and stowed in foreign ports for discharge here. The vessel, including the owner and charterers, is responsible for presenting its ship and cargo in such condition that a stevedoring company can, with the exercise of reasonable and ordinary care expected of experienced longshore workers discharge the cargo without unreasonable risk of injury to the off-loading longshoremen. Further, the vessel has the responsibility to intervene and correct an improper stowage by the foreign loading stevedores which would foreseeably result in an unreasonable risk of injury to the unloading stevedores *as it is being done.*

7. In my experience, there are at least two normal and customary methods of stowing pipe. The most usual and practical is that the bundles are arranged in layers or tiers with cargo separation between each tier and proper vertical separation called shoring to prevent any shifting of the cargo in the stow. With proper cargo separation, the longshore gangs can wrap choker slings around the bundles and hoist them out. The second method for stowage is a "nested stow" commonly used for loose pipe. In this method, the pipes are stowed uniformly and are generally of the same dimension so that they rest securely on each other, also in layers or rows.

8. In my opinion, the stowage onboard the "Jalagopal" which plaintiff was discharging was an extremely dangerous cargo. Not only was there apparently no cargo separation in the form of shoring nor dunnage separating layers, there was no system or pattern to the stowage whatsoever. The cargo

appeared to have been dumped into the hold without any plans for how it could be discharged.

9. Given the stow encountered by the longshoremen including plaintiff, the only available method of discharge was that which the longshoremen were using. The men were searching for those bundles they could best and most safely remove wherever they might be in the hatch and they were attempting to remove the bundles so that the load across the hatch remained as level as possible. This system was reasonable, necessary and as safe as possible given the condition of the stowage.

10. Plaintiff was injured when he was moving away from a stow being lifted out of the hatch. Moving from a lifting load is a proper procedure during the course of a discharge operation. No longshore worker should be standing in the vicinity of the load being discharged due to the obvious hazards of the load falling, equipment breaking or cargo shifting. It was therefore proper for plaintiff to be moving out of the way as he was just before his accident.

11. It is also my opinion that there is nothing plaintiff or the stevedore company could or should have done to avoid plaintiff's accident. Because the cargo was uneven and in the process of discharge across the hold, it would not have been possible to insert walking boards or other flat surfaces during the discharge operations. Therefore I conclude that neither plaintiff nor his employer were at fault in any way in causing plaintiff's accident.

12. Based on my experience in the maritime industry, the vessel including its owners, charterers and officers should have required the cargo to be loaded in an orderly way with proper stowage and dunnaging. It is established custom and practice in the industry that the Captain is in charge of his vessel and has the power and authority to supervise the loading operations to ensure proper stowage.

The facts in this case indicate that the Captain failed to carry out his responsibility resulting in the cargo being in an unreasonably dangerous condition and ultimately causing injury to plaintiff.

I declare under penalty or perjury that the foregoing is true and correct.

Executed at San Pedro, California this 7th day of October, 1991.

HEINZ W. FRISCH
Heinz W. Frisch